No. 3941

United States Circuit Court of Appeals

For the Ninth Circuit

FAIRBANKS, MORSE & COMPANY, A CORPORATION, *Plaintiff-in-Error*

vs.

LEVI F. AUSTIN AND JAY R. AUSTIN, COPARTNERS DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF AUSTIN BROTHERS; HELEN S. AUSTIN, AND NETTIE M. AUSTIN, AS TRUSTEE, *Defendants-in-Error*

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE FRANK H. RUDKIN, JUDGE

PETITION FOR REHEARING

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We have carefully examined the majority opinion of this Honorable Court, as well as the dissenting opinion, and think that with propriety we may

ask the court to consider whether this case be not one in which it will be proper to grant a re-hearing to the plaintiff-in-error.

A reading of the majority opinion convinces us that its writer has disregarded or overlooked entirely certain portions of the testimony introduced at the trial over the objections of counsel for plaintiff-in-error, as well as the written proposal or contract upon which the first and second causes of action set forth in the complaint are based. No mention whatever is made of this written proposal or contract in the majority opinion, but Chief Justice Ross, in the dissenting opinion, has it in mind when he says that the sales agent of plaintiff-in-error was not by the record shown to have been authorized to incur on its behalf any liability.

While we admit that only in rare instances should counsel for clients, in an appellate court file a petition for re-hearing, we are firmly of the opinion that if ever any case merited a re-hearing this is one. Had the court not disregarded or overlooked entirely the vital, fundamental and essential principle of this case, we would not be presenting this petition. Feeling, however, that this is a case of far-reaching importance, not only to the plaintiff-in-error but also to all others in this juris-

diction engaged in the sale of machinery, we are entitled to the application of general law to the particular facts,—because if this case becomes a precedent it unsettles accepted principles and may have detrimental consequences beyond this important controversy. On the fundamental principle involved in this case, viz., the authority of the salesman of plaintiff-in-error to bind it in the light of the limitations and restrictions in the signed written proposal, there is a conscientious difference of opinion, as seen in the strong dissenting opinion of Judge Ross, which, to our mind, correctly applies the general law to the particular facts of the case. We are not satisfied that this case has received the thorough, patient, studious and conscientious attention and examination that cases usually have in this court, otherwise this foundation principle would not have been lost sight of entirely. Because therefore of the gravity and utmost importance of the principles of law applicable to this case, we submit the following grounds in support of our request for a re-hearing:

I

The limitation upon the authority of Powell, the salesman of the plaintiff-in-error, was brought home most clearly, pointedly and forcibly to the knowledge of Levi Austin, one of the defendants-in-error, by the written proposal or contract dated September 25, 1919, at the time it was made, by its express terms, and such a limitation was absolutely binding, and said written proposal thereby was made the sole basis of the contract of sale; and any knowledge obtained or communicated to said salesman by said Levi Austin which was not reduced to writing should not have been admitted by the trial court, nor should it have been used by this appellate court as its sole ground for affirming the judgment of the trial court in holding the plaintiff-in-error liable for special damages to the defendants-in-error, because the admission of said testimony is not sanctioned by any law; and the conclusion of this court thereon is contrary to law. This court, on page 2 of the majority opinion says:

"Before the execution of the contract Powell, the agent of the plaintiff-in-error, went over the lands of the defendants-in-error and discussed with them their problem of irrigation. He was told that their irrigation must begin by April 1st, and he assured

them that there would be no delay in delivering the machinery in due time. It was fully understood that in order to save the crops of defendants-in-error it would be necessary that the machinery be installed by the time so agreed upon."

We regret that the majority of the court did not quote verbatim from the testimony upon this point as Judge Ross did in his dissenting opinion, because if it had the words, "it was fully understood that in order to save the crops of the defendants-in-error it would be necessary that the machinery be installed by the time so agreed upon" would have been omitted. For our present purpose it is not necessary, however, that this testimony should be quoted by us, although for another purpose we may call attention to it later, but before this testimony became at all material we submit the court must decide what to do with the clause in the written proposal which reads as follows:

"It is expressly understood this proposal made in duplicate contains all agreements pertaining to property herein specified, there being no verbal understanding whatsoever, and when signed by purchaser and approved by an executive officer or local manager of Fairbanks, Morse & Co., becomes a contract binding parties thereto."

Clauses in contracts for the sale of machinery providing in substance that the acceptance of the

machinery upon arrival shall constitute a waiver of all damages in delays, have been upheld by the courts, both state and federal. To our minds there can be no distinction between such clauses and the clause in the contract or written proposal in the case at bar. See

Lancaster Elec. Light, Heat & Power Co. v. Platt Iron Works, 172 Fed. 314.

Victor Chemical Works v. Hill Clutch Co., 152 Fed. 393.

There is no indication anywhere in the majority opinion that the particular clause above mentioned was noticed or considered at all,—a clause, we contend, upon which this case must stand or fall. It is true that we did not in our brief discuss this particular clause at great length, or cite authorities in support of our contention, because we felt that a mere statement of its language, followed by our objections to the introduction of any testimony as to the conversation had between Levi Austin and Powell, the salesman of plaintiff-in-error, and Assignment of Error No. 2, based thereon, would be more than sufficient to fully advise the court of our position. Before considering any other question in the case, this particular clause in the written proposal or contract should have been dealt with

and a disposition made thereof, either by deciding that it was binding or not binding upon the defendants-in-error. Judge Ross in the dissenting opinion says that by the record Powell is not shown to have been authorized to incur in behalf of his principal any such liability as is claimed here. The only testimony in the record which would show this fact would be the written proposal. It was incumbent upon the defendants-in-error to show Powell's authority; they made no effort or attempt to show such authority and right at the threshold they are met by the terms of the written proposal which Levi Austin signed for them, in fact, they base their two causes of action, one for general, and one for special damages, upon this written contract or proposal; they plead it in their complaint, they introduce it in evidence,—without making any allegation that it was signed by fraud, misrepresentation, undue influence, or over-reaching, or that they did not know what was in the instrument which was signed. They stand squarely upon this written proposal with the terms contained in the clause above mentioned, and upon it they must stand or fall in this court.

In the case of *Nielsen v. North-Eastern Siberian Co.*, 40 Wash. 194, our Supreme Court had occasion

to pass upon a written contract made with the plaintiff by the defendant company; the plaintiff contended that the contract was partly written and partly oral; he claimed that the agent of the company had told him he could land where he pleased during the period of his employment and be returned to an American port whenever he desired, while the written contract required him to remain with the defendant company until October, 1904. In passing upon the contract, the court used the following language which is applicable to the facts in the instant case:

"The contention that the contract was partly oral we do not think can be sustained. The negotiations with Perkins and Armstrong may have been matters of inducement, but the only contract was the written one which appellant signed and which respondent signed by its president and manager, Rosene. The conversations, promises and understandings, leading up to a written contract, do not constitute a part of the agreement. They culminate in the written instrument which is presumed to embody those matters upon which there has been a meeting of minds. * * * * *

"The written contract being signed on behalf of the company by Rosene, this fact was evidence to appellant as to whom he should deal with concerning matters appertaining to his contract of employment. It would seem from the evidence that

Armstrong, upon whose statements appellant seems principally to rely as a part of his contract, was merely a man employed to solicit prospectors to engage in respondent's service. As such he would not have power to make or modify contracts for respondent."

In *Buffalo Pitts Co. v. Shriner*, 41 Wash. 146, the company brought suit to recover upon promissory notes given in payment of certain machinery, which were secured by mortgage upon said machinery. The defendant signed and delivered to an agent of plaintiff a written order for the purchase of a second-hand threshing machine, engine and appurtenances. This order was in the form supplied by agents of the company to intending purchasers, and embodied the following printed provision:

"This order is subject to the acceptance and approval of said company at its home office, and when so approved and accepted is a binding contract which no person has authority to modify or vary in any respect, or to waive any of its conditions except in writing approved by the management at the home office. . . . This form of contract is furnished in duplicate, see that you have a copy of it and keep it for reference. This warranty does not cover second-hand machinery sold. All conditions of this sale must appear on the within order, as no verbal agreements of whatever nature will be recognized or allowed."

This order was sent to the home office of the plaintiff, where it was accepted and machinery delivered. In his answer to the complaint to reduce notes to judgment and to foreclose chattel mortgage, defendant alleged affirmatively various guaranties and warranties concerning said machinery. At the trial plaintiff objected to the introduction of any evidence in support of defendant's affirmative defenses, and its objection was sustained by the trial court. Defendant then asked permission to amend its answer by alleging that he was induced to enter into the contract of purchase and to execute notes and mortgage by reason of the false and fraudulent representations made orally by respondent's agent as to the construction, character, material and quality of the machinery. This request was refused for the reason that it constituted no defense in view of the language of the contract. Judgment for plaintiff upon the note was entered. In sustaining the ruling of the lower court, the Supreme Court of Washington used this language:

"The rulings of the trial court as to the affirmative defenses and the requested amendments are the only questions presented for our consideration. We think these rulings were right. It is a general rule of law that statements made during the negotiations which culminate in a written instrument can not

be admitted to contradict or defeat such instrument. An exception, or apparent exception, to the rule arises in those cases where, by fraud, misrepresentation, undue influence, or overreaching, a party is induced to sign or execute a written instrument. But the evidence of such improper influences must be clear and satisfactory. In the case at bar, it is not contended that appellant did not know what was in the instrument he signed. Upon the oral argument his counsel, in answer to a question, stated that there was no such contention. He therefore knew that the written contract contradicted what he alleges the agent told and represented to him. The written order or application stated plainly that the warranty therein did not apply to *second-hand* machinery.

"It also contained the following statement: 'All the conditions of this sale must appear on the written order *as no verbal agreements of whatever nature will be recognized or allowed.*' Knowing of these statements in this order and contract, which he signed and which he states he carefully read, how can he be heard to say that the oral representations of the agent, made beforehand, induced him to sign said order and to subsequently execute the notes and mortgage in payment for the machinery? This instrument told him the company would not be bound by anybody's representations except those contained in that identical document. He knew all this before the purchase was consummated or the notes or mortgages executed. Written instruments would be of little value if they could be overthrown upon such a showing as this."

In the case of *Buckeye Buggy Co. v. Montana Stables*, 43 Wash. 49, the defendant ordered in writing from plaintiff, through salesman Van Sant, as shown by written order, two vehicles. This order contained the following language:

"All orders taken subject to approval of Home. No agreement or condition will be recognized unless written upon this blank. Everything must be written on this order as no verbal agreements or promises will be recognized."

Upon suit to recover purchase price, defendant claimed an oral agreement with the salesman as to certain extras or addition to one of the vehicles. Plaintiff recovered judgment for the full amount sued. This was affirmed upon appeal the court saying regarding the introduction of parol testimony as to a contemporaneous oral agreement, in the absence of fraud or mistake:

"We are clearly of opinion that the order or contract can not be modified or varied by parol testimony as to contemporaneous oral agreement. The rights of the parties must therefore be determined by the written contract."

Should the court feel that the decisions of our own state supreme court are not applicable or sufficient when applied to the facts of this case, we cite

with confidence that it will be accepted as authority upon the particular question to be decided, the case of:

New York Life Insurance Co. v. Fletcher, 117 U. S. 519, 29 Law. Ed. 934.

This is a case arising upon insurance contract, but we are not aware that an insurance contract has any more sanctity or sacredness about it than any other contract, and it is governed by exactly the same rules and principles of law as other contracts. Fletcher sued the insurance company to recover $10,000 upon policy of insurance on the life of his decedent, Alford, made in December, 1877. Alford died in September, 1880, and this action was brought by his executor to recover the above amount. As stated by counsel for the defendant-in-error in his brief, "the main question presented by the case is, whether the clause in the application and in the policy to the effect that no statements, representations, or information made or given by or to the person soliciting or taking the application, or to any person, shall be binding on the company, or in any manner affect its rights unless such statements, etc., be reduced to writing and presented to the officers of the company at the home office, in the application referred to, is such a notice to the applicant or

to the insured of the limitation of the powers of the soliciting agent, as exempts the company from responsibility and liability on the policy, when the solicitor is proved to have fraudulently inserted wrong answers and concealed the fact that he had done so from the applicant."

The declaration attached to decedent's statements and representations in support of his application for policy agreed they should be the basis of any contract between him and the company, and if they or any of them were in any respect untrue, the policy which might be issued thereon should be void, and that all moneys paid on account of the insurance should be forfeited; and further agreeing that inasmuch as only the officers at the home office had authority to determine whether or not a policy should issue on any application, and as they acted only on the written statements and representations referred to, no statements or representations made or information given to the persons soliciting or taking the application for the policy should be binding on the company or in any manner affect its rights, unless they were reduced to writing and presented at the home office in the application.

To the suit of the executor the insurance company pleaded the falsity of the answers and statements

contained in the assured's written application, which were warranted to be true. The reply of the executor was that the falsity of the statements was well known to the insurance company's agents who took the application, and witnesses were produced to testify as to what was said by the decedent at the time in which he called the attention of said agents to his physical condition and that he was not an insurable risk.

The trial court in substance charged the jury that:

"If they found that at the time of making the application the applicant told the agent that he had diabetes and referred him to his physician concerning it, and that such agent committed a fraud upon the assured by inserting false answers in the application and by suppressing the answers actually given, and by concealing from the assured what he had written in the application, and thereby induced him to sign it without knowledge what it contained, then the plaintiff was not estopped to recover."

The insurance company asked the court to charge the jury in the following language, which was refused:

"1. That it is competent for any party, corporation or individual employing an agent in the negotiation of a contract, *whether of insurance or otherwise*, to limit his powers, providing the limitation is

brought home to the knowledge of the other contracting party, otherwise the principal will be bound by the apparent as well as the actual powers of the agent; and as, in this case, the limitation was made a part of the contract between the parties, it was binding upon them.

"2. That the stipulation between the parties limiting the powers of the soliciting agent and providing that the contract should be based upon the written application, was binding upon the parties, and it was, therefore, immaterial what may have been said by or to the agent at the time of making the application, which was not reduced to writing and presented to the officers of the company at the home office in New York."

Judgment was entered in favor of the executor and against the insurance company for the full amount of the insurance money, but on writ of error to the Supreme Court of the United States it was reversed, the court by Justice Field, saying:

"We are clear that the court below erred, both in refusing the instructions asked and in its charge to the jury in the particular mentioned."

On December 22, 1913, the Supreme Court of the United States, in two cases, on writs of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review judgments which affirmed judgments of the Circuit Court for the Southern

District of Georgia in favor of plaintiffs in actions on policies of life insurance reversed and remanded them for new trials. These two cases are:

Aetna Life Ins. Co. v. Moore, Admr., 231 U. S. 543; 58 Law Ed. 356;

Prudential Ins. Co. v. Moore, Admr., 231 U. S. 560; 58 Law Ed. 367.

In the first of said cases, it is expressly agreed in the application for insurance that:

"No statement or declaration made to any agent, examiner, or other person, and not contained in the application, should be taken or construed as having been made to or brought to the notice or knowledge of said company, or as charging it with any liability by reason thereof."

The second case cited also involved the knowledge of the local agent who prepared the application for policy of life insurance as ground for estopping the insurance company from insisting that the policy was void because of untrue statements in the application made a part of the insurance contract, where the policy provided that "No agent has power in behalf of the company, to make or modify this or any contract of insurance * * * or to bind the company by making any promise, or making or receiving any presentation or information."

Justice McKenna delivered the opinions of the court upon said writs of certiorari and held, in effect, that knowledge of the actual conditions and circumstances by the local agents who prepared the applications for policies of life insurance would not estop the insurance companies from enforcing a condition rendering the policies void if untrue statements were made in the application.

To the same effect, see the case of:

Mutual Life Ins. Co. v. Hilton-Green, 241 U. S., 613; 60 Law Ed. 1202.

which went up to the Supreme Court of the United States on a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment which affirmed judgment of the District Court for Northern District of Florida in favor of plaintiffs in an action upon policies of life insurance and which was reversed and remanded for further proceedings. The case was tried before a jury and the trial court instructed them that the knowledge of the agent of the insurance company would be the knowledge of the company and the insurance company would be estopped from setting up any false statement or misrepresentation of which it had knowledge before the issuance of the policy as a defense to the ac-

tion. At the conclusion of the evidence the counsel for the insurance company asked for a directed verdict which was refused. The U. S. Supreme Court, in disposing of the case, said:

"Considered with proper understanding of the law, there is no evidence to support a verdict against petitioner, and the trial court should have directed one in its favor."

This is exactly what we claim should have been done in the case at bar. Under all, of the authorities, the plaintiff-in-error is entitled to have this court say, either that it has the right to place restrictions and limitations upon its salesman by proper clauses in its proposals when they are brought to the attention of parties dealing with them, or that it has no such right. In view of the positive decisions of the Supreme Court of the United States holding clauses of this kind enforcible, we cannot see how this Court can refuse to apply its rulings to the facts in the case. To hold the plaintiff-in-error for special damages in this case because of knowledge, if any, obtained by or known to the salesman prior to the execution of the contract, is tantamount to saying that no written notice can ever advise the purchaser of limitations placed upon salesmen by their principals. We do

not believe it was ever the intention of any court to hold this to be the law. Because of the failure of the court to pass upon this clause of the contract, we confidently submit that we are entitled to a rehearing in this case.

See also, *Maryland Casualty Co. v. Eddy*, 239 Fed. 477.

II

The record discloses that the following facts and these only were brought to the attention of the salesmen of plaintiff-in-error before the contract was signed:

"Mr. Powell, the traveling agent of the defendant and Mr. Zane, the local agent at Hanford, came to our ranch relative to buying this pumping plant. Mr. Powell's name appears on the contract, which is the first proposal we had. He was on or over our land prior to the execution of the contract and I went over the problem of irrigation with him. We went into details of the plant, that it was not satisfactory for even the acreage we had in then and we wanted to put in more acreage and went into details as to the different lifts and amount of water required, and he proposed this 25-horse power outfit connected to an eight inch pump would be exactly what we would want for this condition and the amount of water. We told him our problem there for irrigation and at this time the outfit we had

there was not satisfactory. We were not getting enough water and we told him we must have a change of some kind and asked what he would recommend to fit our purpose, and he proposed that we take at least a 25 horse power engine and connect it to this eight inch pump and later on if we cared to put in a larger pump this 25 horse power outfit would furnish the power. We told him at that time it would be necessary to have the outfit delivered in time on acount of the water in the spring, and he assured us if we placed our order at that time there would be no question about the delivery of the machinery. We discussed the time the land should be irrigated and it was understood that we were to begin irrigation about the first of April. In going into the contract for the machinery to be delivered the 8th of December it would give us plenty of time to have the outfit installed and begin pumping by the first of April, and that was understood between us and the agent, and the date of the complete installation was definitely fixed as April first."

This is the testimony, and every word of testimony, on which the court must base its decree if it holds that plaintiff-in-error had in contemplation the possible loss that Austin Brothers might suffer should the contract be breached. The plaintiff-in-error's traveling agent was "on or over the land." There is no allegation or proof that he knew how many acres of land was in cultivation, how much of it was old alfalfa or new alfalfa. There is no

allegation or proof that he knew or was told that this locality required four times as much water as ordinarily used. There is no allegation, as has been well said by Chief Justice Ross, "relative to any future planting or the age of the alfalfa." In fact, there was no specific, definite information by which any person could have figured the loss by reason of plaintiff-in-error's breach of the contract.

We are confident that if you take every allegation in the pleading and every word of testimony of every kind relative to what was said and done at the time of submitting the proposition for a contract, it would be imposible for any living man to ascertain what damage, if any, Austin Brothers would suffer should the proposed contract be breached. Had Austin Brothers expected to recover upon breach of the contract for loss to their crops it was incumbent upon them to plead and to prove that at the time and prior to the inception of the contract plaintiff-in-error or its salesman with power to act, was told that they were intending to irrigate a certain definite number of acres which was planted to alfalfa, a portion of which was three years old and a portion of which was planted the preceding year; that they required a certain definite amount of water, which was four times as

much per acre as ordinarily required, and required it to go on to the land at a certain definite date, and failing to get it there on such date the young alfalfa would die and the old alfalfa would suffer so that it was probable the first cutting would be destroyed and the weaker plants would die out and the stand be thinned. And it is our belief that they should have gone even further and said with this water on the land at a certain definite date we will get so many tons of alfalfa to the acre, which will be worth approximately so many dollars. Had definite information of this kind been given plaintiff-in-error at the time of entering into the contract it would have been possible for it then to have estimated or to have had in mind the loss Austin Brothers might suffer by reason of the breach of the contract. In other words, the loss caused by the breach of the contract might have been in the contemplation of the parties, but we contend that not by the wildest stretch of imagination was it possible for the salesman submitting the proposition, and less for plaintiff-in-error to have in mind the damages claimed and allowed by the majority opinion in this cause.

What we have stated heretofore is the minimum of the allegations or statements that should have

been made to allow Austin Brothers to recover. In addition thereto they should have stated the probable market price of hay in the fall or what they estimated the market price would be in the fall. In other words, supposing that there had been some calamitous freak in the weather whereby all the alfalfa within a radius of twenty miles had been destroyed and the only alfalfa raised in that immediate locality was raised by Austin Brothers, and by reason thereof alfalfa was worth twice what it sold for this season, it could not thereby be contended that the parties could have had such matter in contemplation at the time they entered into the contract and they could not logically have been held for such advance price in alfalfa. Neither could they know by intuition that a portion of this alfalfa was young alfalfa that would die if it did not get water by a certain time. There is not one scintilla of evidence going to show that they knew a portion of the alfalfa was young alfalfa until the trial of this cause, and yet it appears that the permanent injury to the crop was largely on account of the young alfalfa sowed the preceding year. Levi Austin states. (St. 63.):

"We started irrigating the new land first; we knew the seeding died before we started to irrigate

the new land, first on the low land. It takes about two weeks on the lower lands. We got that wet and then we found that some of the new seeding was killed, so we immediately re-seeded that before turning the water on the hill because the ground was already wet. * * * We had seeded about 15 acres additional land in the fall of 1919. * * * The effect on that alfalfa for lack of irrigation in 1920 was about seven acres of the new seeding was killed; when we irrigated it the new alfalfa did not come up at all, of course, and when we irrigated the lower land first when we got on the high land on the other 25 acre place it was up in June and that land was gravel and had poorer soil than down below."

Taking every word of evidence of what happened prior to the time the contract was entered into as strongly against plaintiff-in-error as it is possible to put it, and no living man could estimate that losses would be as they proved to be at the time of the trial, and if the rule is as announced in *Hadley v. Baxendale*, 9 Exch. 341, that the injured party to a contract which is breached may recover special damages which arise from circumstances peculiar to the case when the circumstances were communicated to or known by the other party at the time of making the contract and may reasonably be supposed to have been in the contemplation of both parties, 8 R. C. L. 451, 459, we strenuously contend that there is no evidence in the record any-

where that the plaintiff-in-error had reasonable notice of the conditions which rendered the special damages which the defendants in error claim to have sustained and which they seek to recover in this action.

Referring to the letter of March 12, 1920, saying "the delay and uncertainty upon your part in this matter has cost us a lot of money and leaving us in a position where we do not know what to do" or the letter of March 30, "we have sixty acres of alfalfa which should be irrigated at once and in all probability with all of our efforts in installing an outfit at this late hour will lose the first cutting besides some permanent injury to the alfalfa." There is not a word or suggestion that they have young alfalfa which is liable to die, or alfalfa that was seeded the preceding year, and yet a large part of the damages allowed is for such young alfalfa which died and had to be re-seeded.

Again, it seems to us that the case of *Stebbins v. Selig*, 257 Fed. 230, presents a state of facts much stronger for plaintiffs than the facts in this case. In the *Selig* case the defendant was engaged in sinking wells and in furnishing pumps to pump the water and knew absolutely the necessity of getting the water on the land at a certain definite

time. He of necessity had much more detailed information than plaintiff-in-error had in this case. The only knowledge that is brought home to the plaintiff-in-error here is that one of its traveling agents had been "on or over the land," and Austin's statement that he needed water at a certain time, but no details as to the kind of crop grown or condition of the growing crop or probability of the young crop dying, all of which were known to the plaintiff-in-error in the *Selig* case. We do not believe the rule suggested by the majority in this case can be harmonized with the decision in the *Selig* case.

III

We do not believe that the authorities cited in the majority opinion apply to the facts in this case, because it is assumed in their application that proper notice was given to plaintiff-in-error that it would be held liable for special damages if it failed to deliver said machinery within the stipulated time. Most of these authorities were not deemed of sufficient importance by the defendants-in-error to call them to the attention of the court in view of the particular facts of this case.

Attention is called by the majority opinion to the letters written by defendants-in-error to the plaintiff-in-error on March 12, 1920 and March 30, 1920. We do not see the applicability of these letters and for that reason they were not included in the bill of exceptions, as they had nothing to do with the question of special damages. This court, seems to be of the opinion that they are material because they furnish notice to the plaintiff-in-error of possible damages to the defendants-in-error. These letters, however, were written months after the execution of the contract. The cases all hold that where special damages are recoverable on account of breach of contract the knowledge thereof must be within the possession of the seller at the time of making the contract and not several months afterward.

Finally, we respectfully suggest that the court again consider the points taken in our brief filed in this case, as well as the additional points discussed in this petition for a rehearing.

WHEREFORE, upon the foregoing grounds, this plaintiff-in-error and petitioner respectfully prays this Honorable Court to grant it a re-hearing of said cause.

J. D. CAMPBELL,
JOHN B. VAN DYKE,
JOSIAH THOMAS,
Attorneys for Petitioner and Plaintiff-in-Error.

I, Josiah Thomas, of counsel for the plaintiff-in-error, do hereby certify that in my judgment the foregoing petition for a re-hearing is well founded and that the same is not interposed for delay.

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Of counsel for Petitioner and Plaintiff-in-error.